No. 85-495

IN THE

Supreme Court of the United States

October Term, 1985

ANSONIA BOARD OF EDUCATION, et al.,
Petitioners,

v.

RONALD PHILBROOK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE, AND BRIEF AMICI CURIAE, OF AMERICAN JEWISH CONGRESS IN BEHALF OF ITSELF, THE AMERICAN CIVIL LIBERTIES UNION, THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AND THE SYNAGOGUE COUNCIL OF AMERICA IN SUPPORT OF RESPONDENT PHILBROOK

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The American Jewish Congress, the American Civil Liberties Union, the Anti-Defamation League of B'nai B'rith and the Synagogue Council of America respectfully move for an order permitting them to file the attached brief *amici curiae* in support of respondent. Pursuant to Sup. Ct. R.36.2, permission to file was sought from the parties. Respondents Ansonia Federation of Teachers and Philbrook consented, but petitioner Board of Education refused to do so.

The American Jewish Congress is an organization of American Jews founded in 1918, dedicated to the protection of the religious, political, civil and economic liberties of all Americans, but particularly those of American Jews. No liberty enjoyed by Americans is more important to American Jews than religious liberty. For this

reason, the American Jewish Congress has filed many briefs in this Court in cases raising religious liberty issues.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated to preserving and defending the principles embodied in the Bill of Rights. The ACLU is committed to preserving the twin principles of individual freedom to worship and government neutrality in matters of religion embodied in the religion clauses of the First Amendment.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of: the Central Conference of American Rabbis, representing the Reform rabbinate; the Rabbinical Assembly, representing the Conservative rabbinate; the Rabbinical Council of America, representing

the Orthodox rabbinate; the Union of American Hebrew Congregations, representing the Reform congregations; the Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations and the United Synagogues of America, representing the Conservative congregations.

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

The Anti-Defamation League believes that accommodation of the religious beliefs

of all citizens is essential to preserving the principles upon which this nation was founded and is consistent with the strictures of the religion clauses of the First Amendment.

The statute at issue in this case, the religious accommodation provisions of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e(j), is an important means of insuring that religious liberty is more than an abstract ideal, and its vigorous enforcement is of concern to amici. Nevertheless, amici recognize that this statute could be construed in ways which would violate the Establishment Clause. They seek to file this brief because they believe that the judgment below preserves both the freedom to worship as one chooses and the principle of government neutrality in matters of religion

-- the twin principles embodied in the two religion clauses of the First Amendment.

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INTEREST OF THE AMICI

The interest of the amici is fully set forth in the motion for leave to file a brief amici curiae.

STATEMENT OF FACTS

Respondent Ronald Philbrook, (hereafter "Philbrook"), for over 20 years a business teacher employed by the petitioner, Ansonia Board of Education, (hereafter "Board"), is a member of the Worldwide Church of God. [J.A. 17] That church observes the Old Testament holidays, and teaches that its members may do no secular work on those days, but are instead to attend "Holy Convocations". [J.A. 18-21] Some of these holidays typically fall on days on which regularly scheduled classes take place.

Until the teachers in the Ansonia schools elected to be represented by a union, Philbrook was allowed to take off his religious holidays with no loss of pay.

[J.A. 21-22] The situation changed from the time the respondent,[1] Ansonia Federation of Teachers (hereafter "Union") negotiated its first collective bargaining agreement. Although the Board allowed -- and continues to allow -- Philbrook to be absent on his religious holidays, and insists that in so doing it has accommodated his religious beliefs, [J.A. 54] from that time on he began to be docked pay, as he was absent for holidays in excess of the days allocated for personal leave days under the contract. [J.A. 22]

The number of days which teachers might take off during the school year has always been a contested subject during the collective bargaining between the Board and

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[1] The Ansonia Federation of Teachers (hereafter "Union") did not join in the petition for certiorari, and hence is a respondent, although supporting the position of the Board, Sup. Ct. R. 19.6.

the Union. [See, e.g., J.A. 73-101]

All of the contracts since 1967 have allowed for three days a year of paid leave for religious holiday observances. [J.A. 74, 75, 77, 80, 83, 86, 89, 92-93, 95, 99] Philbrook testified that the number of days for religious observances "was [chosen] for the religious purposes of the Jewish population at this time." [J.A. 24]

The contracts also provided for additional leave days for a variety of purposes, including illness, deaths in the family, weddings, graduation, service as a delegate to a veterans' organization, and, crucially, the transaction of "personal business." [See, e.g., J.A. 73, 75, 77, 79, 80, 82, 85, 88-89, 91-93, 94, 98-99]

The conditions under which these personal business days might be used have varied. The 1967-68 agreement provided for 5 days leave for "personal or legal" reasons. [J.A. 72] The next year's

contract provided that they were to be granted only at the Superintendent's discretion. [J.A. 74] The contract was changed in 1969 to provide for three days personal business leave, "at the teacher's discretion but not including marriage or travel for personal or family convenience." [J.A. 76]

The personal business leave provision was again amended in 1971 to exclude purposes covered by other provisions of the contract. Otherwise, the days were usable wholly at the teacher's discretion. [J.A. 83] The provision was amended in 1975 to again require the approval of the Superintendent. [J.A. 89]

The leave provision was amended in 1982, so that one day was "granted at the discretion of the professional staff, except that the day may not be used for purposes for which other provision is made in the contract." [J.A. 95] The remaining two

days require administrative approval, although "reasons for such leave may be stated in general terms if the professional staff member is concerned with protecting the confidential nature of the personal business." Id.

At first, as the Board has always agreed he might do, Philbrook simply took off on his religious holidays, absorbing the loss of income. [J.A. 22] Later, however, as the loss of income began to become more substantial, and having filed complaints of religious discrimination with the Connecticut Commission of Human Rights and the E.E.O.C., he made two proposals which would have allowed him to be accommodated with a minimal loss of income. [J.A. 22] First, he proposed that he be allowed to use the three personal business days for religious purposes, paying the costs of a substitute teacher. [J.A. 22-24] In addition, he offered to make up at other

times classes he missed, an offer which included payment of the costs of substitutes the class time lost. [J.A. 24]

Because neither proposal was accepted, and Philbrook could no longer bear the resulting loss of income, in 1976 he began to schedule medical appointments on his religious holidays so that he could be paid. While such scheduling did not allow him to attend church services, it did allow him to avoid secular work. [J.A. 26-28; 35-39]

The Superintendent of Schools testified that, under the contract as it stood at the time of trial, it was one of his duties to police the use of religious leave days by teachers. He testified that teachers were required to give 48 hours notice of their intention to use those days, but that as to one of these days, teachers needed no advance approval. [J.A. 51-52; 64] As to that day, the Superintendent was, however, empowered to deny leave, if by chance he

learned that it was used for an impermissible purpose. [J.A. 53, 64-65] There was no testimony as to how often, if ever, this occurred. As to the remaining personal business leave days, prior permission was needed, [J.A. 52-53] although, as noted, the reasons for leave could be stated in general terms. [J.A. 99-100]

In an effort to demonstrate that paying Philbrook for the absences it was allowing him to take would cause undue hardship, the Board produced testimony from the Superintendent of Schools that, because of the difficulty in obtaining certified substitutes, particularly in specialties like Philbrook's (business) the absence of a teacher meant that no learning took place. [J.A. 55-59] Moreover, the Superintendent testified that some substitutes were unable to control their assigned classes, with

damage resulting to business equipment. [J.A. 57-8]

In rebuttal, Philbrook testified that when he was to be absent for a religious holiday he prepared work in advance which students could do when he was absent. Philbrook testified that this procedure enabled him to tell whether any work was accomplished by his students. He also testified that his students have always remained in their classroom doing work in his absences. [J.A. 68-70] The District Court never resolved this conflict in the evidence.

STATEMENT OF THE CASE

After efforts at conciliation failed, and Philbrook received a right to sue letter, suit was brought in the United States District Court for the District of Connecticut. A two day trial was held.

The District Court entered judgment for the Board. Its entire holding on the reasonableness of the Board's proposed accommodation follows:

> [P]laintiff was not subject to <u>any</u> power to attend or not attend any holy day service. He could go without let or hindrance whenever and wherever he wished. He might lose some pay or even his job. The plaintiff did not want it that free. He wanted it to be free as far as his desire or obligation permitted plus pay. That is why he said he did not exercise his "unfettered right to worship, it would cost him money - not that he was prevented." He testified he used to go even after he used his three days but he got tired of having to lose pay for not working.
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> §2000e-2(j) specifically prohibits an employer granting preferential treatment to any individual because of race, color, religion, etc. But there must be a

reasonable accommodation by the employer, General Electric Co. v. Gilbert, 429 U.S. 125 (1977). Congress got the message as it related to government employees and the next year (1978) it passed and the President approved P.L. 95-390, 5 U.S.C. 5550a, which provides for Government employees' compensatory "time off" for religious observances, wherein an employee who elects to work certain overtime is granted equal compensatory time off from his scheduled tour of duty (in lieu of overtime pay) for such religious reasons. In sum, the accommodation is overtime work for equal compensatory time off - plaintiff agrees with everything except the work part. He received time off after 3 paid days without pay.

A divided Court of Appeals reversed the judgment and remanded the case for further fact-finding. The Court of Appeals presumed that the Board's policy of allowing three paid religious holidays and the remainder as unpaid leave was reasonable. Nonetheless, it held that, where there were multiple reasonable accommodations, "Title VII requires the employer to accept the proposal the employee prefers unless the accommodation causes undue hardship on the

employer's conduct of his business." Philbrook v. Ansonia Bd of Educ., 757 F.2d 476, 484 (2d Cir. 1985)

Having so held, the majority in the Second Circuit held that the District Court on remand must make factual findings as to whether either of Philbrook's proposals would cause undue hardship. As to the first proposal, that the restriction on using personal business leave days for religious observances be dropped, the Court framed the inquiry as follows:

> The critical factual question concerning this proposal is the past and current scope of the personal business leave provisions ... whether any such day may be taken for any reason except those specifically mentioned, such as religious reasons. ... The presence of a contract provision that allows leave for limited secular activities, such as sick leave or leave for court appearances, does not show that additional paid leave for religious observance in lieu of personal business leave would not cause undue hardship. Employers and unions must be free to outline specific types of paid leaves in a contract without the threat of being charged with

> religious discrimination. But if the personal business leave provision is as broad as appellant claims, it becomes difficult to believe that dropping the religious exception causes undue hardship.

As to Philbrook's proposal to reschedule missed classes, the Court of Appeals ordered the District Court to inquire as to the educational and fiscal costs which would be imposed by that proposal.

Finally, the Court concluded that neither proposal would grant Philbrook an impermissible religious preference, for, "differential treatment cannot be equated with privileged treatment." 757 F.2d at 487.

SUMMARY OF ARGUMENT

1. The Title VII requirement that employers reasonably accommomdate religious practice requires that an employer implement the accommodations which, while causing no undue hardship, cause the employee the least

burden. This result follows inexoraoly from the statutory prohibition on discrimination in "compensation, terms, conditions or privileges of employment." It follows that the fact that a partial accommodation has been made is not conclusive of Philbrook's claims.

2. Where an employer grants its employees leave days they can use for a wide variety of reasons, it may not deny them the right to use those days for religious days. In this case, it is not clear whether the personal business leave days are so available, or whether their use is limited to some narrow class of uses. Because the District Court made no factual finding, the Court of Appeals correctly remanded the case for an inquiry into the actual operation of the personal leave days.

3. The Board's argument, based on T.W.A. v. Hardison, 432 U.S. 63 (1971) that

provisions of a collective bargaining agreement are immune from the duty to accommodate is untenable. Not only did Hardison involve the protection of a seniority system, but Hardison itself noted that a contract could not be used to violate Title VII. Collective bargaining agreements are designed to protect the interests of majorities; Title VII those of individuals. Hence, a collective bargaining agreement cannot immunize an employer's conduct from Title VII scrutiny.

4. Neither of the accommodations proposed by Philbrook called for preferential treatment, or, on their face, create undue hardship. Philbrook is not entitled by virtue of Title VII to something for nothing; however, neither of Philbrook's proposals sought something for nothing. Philbrook's proposal for dropping the restriction on the use of personal business days sought not a subsidy, but the right to

use days off earned by him. The second proposal simply called for a rescheduling of his class schedule. While it is conceivable that the Board could demonstrate that rescheduling classes would cause it undue hardship, it was equally likely that such a shift would cause it no harm.

More to the point, in evaluating the Board's claims of undue hardship caused by Philbrook's absences, it is necessary to bear in mind that however this case turns out, Philbrook will be absent on his days off. The Board does not contend here -- and has never contended -- that Philbrook is not entitled to absent himself. The only question is whether he may be paid for those days. For this reason, evidence of educational disruption would appear to be irrelevant.

5. Accommodating Philbrook would not disadvantage any other employee. Under either, he would give full economic value

for his pay. Unless any accommodation is a preference, Philbrook cannot be said to demand an illicit preference.

6. This Court, and every Court of Appeals which has considered this issue, has upheld the constitutionality of reasonable accommodation. The Board's further argument that Philbrook seeks a religious subsidy has no merit either on the facts or the law. Because Philbrook has earned the right to these personal leave days, their use by him for religious purposes is no more a government subsidy for religion than a government employee's donation of his paycheck to a synagogue.

Application of the three-part test leads to the same result. Accommodating Philbrook does not suggest any purpose other than the elimination of religious discrimination. The primary effect of accommodation is the same -- particularly

since, by definition, accommodation is inevitably a response to individual choice.

I. ARGUMENT

A. Respondent Suffered Discrimination Actionable Under Title VII's Ban On Religious Discrimination

The central premise of amici's position is simply stated: the Title VII requirement that employers "reasonably accommodate" an employee's religious practice requires the employer to choose the accommodation placing the least burden on the employee which creates no undue hardship on the conduct of the employer's business. The judgment of the Court of Appeals remanding this case for further fact-finding on the question of undue hardship is entirely consistent with this principle and should be affirmed.

Title VII of the 1964 Civil Rights Act reflects the particular importance of religion and religious practice to the

American people. After all, only religious belief and practice are protected by the statute. No matter how important to the individual, political, social or ethnic observances, even those related to race, sex or national origin, are not protected.

The inclusion[2] of religious practices within the definition of "religion" for Title VII purposes affords employees' religious practices the full panoply of substantive rights guaranteed by Title VII. Thus, an employer may not discriminate on the basis of religious belief or practice in any of the "compensation, terms, conditions or

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2 In the wake of decisions casting doubt on the scope of Title VII's ban on religious discrimination, see, e.g., Dewey v. Reynolds Metals, 429 F.2d 324 (6th Cir.), aff'd oy an equally divided court, 402 U.S. 689 (1971), Congress redefined the term "religion" for Title VII purposes to include discrimination sounding in employee religious practice or religious faith, 42 U.S.C. §2000e(j).

privileges of employment," 42 U.S.C. §2000e-2(a)(1).

For this reason, this Court has held

> A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all. Those benefits that comprise the "incidents of employment' ... or that form "an aspect of the relationship between the employer and employees' ... may not be afforded in a manner contrary to Title VII.
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> Hishon v. King & Spalding, 104 S.Ct. 2229, 2234 (1984).[3]

The one exception to the general rule is that a religious practice discrimination claim is rebutted by a showing that accommodation would cause "undue hardship", T.W.A. v. Hardison, 432 U.S. 63 (1971).

Since Philbrook is denied equal compensation for observing his religious

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[3] The Equal Employment Opportunity Commission reached the same conclusion in its Guidelines on Discrimination Because of Religion, 29 C.F.R. §1605.2(c)(2)(ii).

practices, it follows that, unless the Board demonstrates undue hardship, Philbrook is the victim of illegal discrimination.

The Board [Brief at 12-15] argues[4] that, because Philbrook is allowed to take off on his religious holidays (albeit some as leave without pay) and keep his job, it has reasonably accommodated him and is not obligated by Title VII to do more. However, the interests protected by Title VII go beyond the mere right to hold a job, Hishon v. King & Spalding, supra, but include the right to be treated equally with regard to "compensation terms, conditions or privileges of employment." Therefore, the

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[4] Both the Board [Brief at 12-15] and Union [Brief at 4-15] argue that Philbrook did not make out a prima facie case of religious discrimination. Since this case was fully tried on the merits, "it is surprising to find the parties ... still addressing the question whether [Philbrook] made out a prima facie case," U.S. Postal Service v. Aikens, 460 U.S. 711, 714 (1983), thus "unnecessarily evad[ing] the ultimate question of discrimination vel non." Id

fact that Philbrook is forced to accept diminished earnings is within the scope of Title VII, even though he has not lost his job.[5]

For example, in Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983), this Court held that the Pregnancy Discrimination Act, 42 U.S.C. §2000e(k), prohibits an employer from excluding even the spouse of an employee from pregnancy health insurance coverage. It specifically rejected the argument that this form of discrimination was too insignificant to be illegal. A fortiori, the loss of

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5 Different jobs pay different salaries, provide different promotional and advancement opportunities, have different work loads, call for the use of different skills, provide varying psychic or professional satisfaction, desirable hours or other fringe benefits, including vacation time. The statutory protection of right to be free from discrimination in "compensation, terms, conditions or privileges and of employment" is a recognition of this reality.

income caused Philbrook by the Board's refusal to consider a more complete accommodation is also discrimination under Title VII.

The argument of amicus AFL-CIO [Brief at 9] that Title VII protects only against a loss of employment rests on the faulty premise that, because the legislative history of §2000e(j) focused on the loss of employment, the applicability of that section should be similarly constricted.[6] However, the relevant legislative history is brief, and its silence as to discrimination less severe than loss of employment does not subvert the plain meaning of the statute any more than did the legislative silence in

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6 Amicus AFL-CIO also argues (Brief at 11-12] that its parsimonious reading of Title VII is necessary in order to avoid a substantial constitutional question. For the reasons stated in Point III, infra, the judgment below creates no constitutional difficulties.

Newport News Shipbuilding & Dry Dock Co. v. EEOC, supra.

The accommodation implemented by the Board did not provide for non-discriminatory treatment of Philbrook in "compensation, terms, conditions or privileges of employment"; that it partially accommodated Philbrook therefore does not suffice to free the Board of Title VII liability.[7]

B. Title VII Bars An Employer From Excluding Religion As An Acceptable Use of Leave Days

Philbrook is required by his religion to abstain from gainful employment on the

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7 There is yet another reason why Philbrook's partial accommodation is not conclusive. The discrimination worked by the Board's policy is the result of impermissible religious discrimination. Philbrook testified -- and his testimony is unrebutted on this crucial point -- that the number of religious observance leave days "was [chosen] for the religious purposes of the Jewish population at this time." [J.A. 24] The Board incorrectly asserts [Brief at 17, n.6] that "there is no evidence in the record that the leave provision was designed to prefer one religious group over another."

Old Testament holidays, some of which fall on school days. The number of days involved varies with the calendar, but it almost always exceeds the three days a year the collective bargaining agreement sets aside for religious observances. Philbrook has either been docked several days pay a year [J.A. 22] or, in more recent years, felt compelled either to violate the tenets of his faith in order to adequately provide for his family[8] or to schedule medical appointments for those days, thus justifying use of paid sick leave days and eliminating the loss of income. [J.A. 25]

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8 The Court of Appeals correctly held that the Board having forced Philbrook to chose between supporting his family and his religious beliefs, cannot contend that his decision to prefer his family evidences insincerity precluding his invocation of Title VII. It was precisely to avoid such conflicts that 42 U.S.C. §2000e(j) was enacted, 118 Cong. Rec. 712 (remarks of Sen. Randolph).

The Board insists that it may, consistent with its obligations under Title VII, refuse to allow Philbrook to use any personal business days for religious purposes. The court below, in remanding this case for further fact finding, did not reject that view outright. Rather, it correctly held only that the District Court, which erroneously held that the Board's offer of partial accommodation satisfied its duty under Title VII, had failed to make factual determinations necessary to resolve Philbrook's claims. Specifically, the District Court failed to determine the scope of permissible uses, in actual practice, of the personal business leave days.

If paid personal business leave days may, in fact, be used for any, or practically any, purpose, Ansonia's policy of excluding religious uses would violate Title VII, for it would constitute precisely the type of interference with, and penalty

for, religious observance §2000e(j) makes illegal. On the other hand, if the permisible category of uses, in actual practice, was tightly constricted to some narrow category of "business" uses, so that these days were not broadly available for use at a teacher's discretion, Title VII would not be violated by the challenged policy.

Because the District Court did not determine whether the personal business leave days, or part of them, could be so used at the discretion of teachers, it ordered the case remanded to the District Court to determine whether the three days, or any of them, could be used "for any purpose whatever," or whether, in fact, they were limited to a limited range of special and unusual circumstances. On the facts presented here, that judgment is unassailable.

Given the vagueness of the collective bargaining agreement's broad leave provisions, see p. 2-7, supra, and its apparent availability for a wide variety of personal purposes, the Court of Appeals correctly ordered the District Court to consider the actual operation of the personal business leave days.

At trial, there was conflicting evidence concerning the extent to which the Board in fact policed the personal business leave provisions, either as to the first day, by contract usable wholly at a teacher's discretion subject only to post hoc enforcement by school officials if they chanced to learn of an impermissible use [J.A. 95], or the remaining two leave days for which permission must be sought in advance. [J.A. 51-2, 53-4, 61, 65] (testimony of Superintendent of Schools)

The contract itself does little to restrict the use to which these personal

leave days may be used aside from prohibiting the few specified uses which are covered by other contractual provisions. On the contrary, it explicitly permits teachers to describe the purposes for which they seek the two discretionary personal business leave days in broad terms, to protect teacher privacy in regard to the precise purposes to which the days will be put. [J.A. 99] Actual and effective restrictions, if any, on the use of personal business leave days exist, if at all, outside the four corners of the

contract.[9] Because this case turns in large part on resolution of this factual question, the Court of Appeals properly ordered a remand.

C. A Collective Bargaining Agreement Provides No Blanket Immunity Under Title VII

Merely because the alleged discrimination is embodied in a collective bargaining agreement does not shield it from Title VII. The Board's claim [Brief at 27-28] that Title VII never requires an

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[9] The court below held, 757 F.2d at 484, without citation of case authority or legislative history, that, where both employer and employee propose reasonable accommodations not creating undue hardship, Title VII requires the employer to accept the proposal the employee prefers.

This view cannot be sustained. Nothing in the legislative history, supports a rule requiring an employer to accept an employee's proposal. Absent discrimination, the Act imposes no duty on employers to maximize the employment of members of protected groups, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

employer to deviate from the terms of a collective bargaining agreement is plainly untenable.

In support of its argument, the Board points to T.W.A. v. Hardison, supra, where this Court held that the duty to acommodate did not obligate an employer to unilaterally abrogate a bargained for seniority system, for (432 U.S. at 79) "we do not believe that the duty to accommodate requires ... steps inconsistent with the otherwise valid agreement."

However, Hardison is readily distinguishable on a number of grounds. First, it involved not just any provision of a collective bargaining agreement, but a seniority provision, which enjoys special protection under Title VII, 42 U.S.C. §2000e-3(h), Firefighters Local Union v. Stotts, 467 U.S. 561 (1984).

Second, this Court in Hardison specifically noted that "a collective

bargaining agreement may not be employed to violate [Title VII]". Unless justified by a showing of undue hardship, the exclusion of religious days as a permissible use of days otherwise broadly available for personal business use (should that prove to be the case) is an agreement to violate the statute, which grants protection to such observances, in denigration of Philbrook's statutory rights. Finally, to accept the Board's argument would immunize contractually arranged discrimination from the scope of Title VII -- a result that has been repeatedly rejected.[10]

This result follows inexorably from the different interests protected by Title VII, on the one hand, and collective bargaining

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10 See, e.g., Williams v. New Orleans Steamship Ass'n, 673 F.2d 742 (5th Cir. 1982), cert. denied, 460 U.S. 1038 (1983); U.S. v. San Francisco Railway Co., 464 F.2d 301 (8th Cir. 1972); U.S. v. Hayes Int'l Corp., 456 F.2d 112 (5th Cir. 1972).

agreements on the other. Collective bargaining contracts reflect the concerns of bargaining unit majorities. Subject only to the duty of fair representation, a union must seek a contract which furthers the interests of a majority of its members; the rights of minority members must yield for the sake of the common good. Title VII, by contrast, protects the rights of individuals; those rights cannot be whittled away by union majorities, Wygant v. Jackson Bd. of Educ., 54 U.S.L.W. 4479, 4481, n.4 (1986) (plurality opinion of Powell, J.); cf. Connecticut v. Teal, 457 U.S. 440 (1982).

A blanket rule that no provision of a union contract need be waived to accommodate religious practices, even if the provision in question did not adversely affect any other employee or create undue hardship, would eviscerate 42 U.S.C. §2000e(j) for

any worker subject to a collective bargaining agreement.[11]

Only a wooden insistence on enforcing a contractual provision as written, without regard to the important values protected by Title VII, could justify an objection to a waiver of the contractual provision under such circumstances. Hardison does not require such a draconian rule.

Of course, where an accommodation of one employee's religious practice has the effect of depriving other employees of their rights, then the Establishment Clause may impose some limitations, Estate of Thornton v. Caldor, 105 S. Ct. 2914 (1985). However,

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[11] A readily available accommodation is to make up time lost for religious observance by working past the end of the normal workday. Many union contracts, however, provide that such work must be paid at premium overtime rates. If make-up time for religious observance is subject to such contractual provisions, there will frequently be a more than de minimis cost to the employer, thus excluding this common form of accommodation.

in this case, invalidating the religious observance restriction on the use of personal business leave days does not deny rights to any other employee.[12]

II. The Court Below Correctly Held That The Question of Undue Hardship Could Not Be Resolved On This Record

A. Philbrook Did Not Seek Something For Nothing

The Board [Brief at 25-31] contends that either of Philbrook's proposed further accommodations would, on the basis of his religion, result in his being paid for not working or, phrased somewhat differently, impermissibly grant Philbrook preferential benefits not accorded other employees on the basis of religion. It claims that, under Hardison, Philbrook has no statutory entitlement to such a preference; that,

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12 The judgment below properly left open the question of whether Philbrook's proposals impose more than a de minimis cost on the Board, see pp. 35-41, infra. It thus cannot now be said that the judgment imposes a substantial cost on the employer.

on the contrary, such preferences are proscribed.

Philbrook is, of course, not entitled to something for nothing. Any such windfall would grant him preferred employment opportunity, in violation of well settled, indeed fundamental, Title VII principles, T.W.A. v. Hardison supra, and, possibly, the Establishment Clause as well, see Point III, infra. Moreover, requiring an employer to incur financial costs for which no reciprocal economic value is returned by the employee would constitute more than de minimis hardship, T.W.A. v. Hardison, supra. Such is not the case here.

1. Philbrook's First Proposal

Philbrook offered two distinct accommodations. First, he suggested that he be permitted to use the three paid personal business days for religious observance. [J.A. 23-25] He suggested only the dropping of the prohibition on using these

three[12] days for religious purposes, in effect analogizing religious observances to visits to the hardware store, the hairdresser, the real estate agent or a job interview. He did not seek an unlimited, unusual, subsidy for his religious observances.

Each teacher in Ansonia "earns" the right to use these three days for personal business by performing his or her normal duties. It is true that a teacher need not take these days and that many do not. [J.A. 60] Nevertheless, each teacher has "earned" the right to three paid personal leave days. They are as much a part of the "compensation, terms, conditions or

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12 Philbrook does not seek an unlimited number of paid leave days for purposes of religious observance; the contrary suggestion of the Board [Brief at 11,19, 21] that an affirmance would mandate that employers provide an unlimited number of paid religious holiday days, is simply wrong.

privileges" of employment in the Ansonia school system as a paycheck. Philbrook has paid full economic value for those days by performing his teaching duties, and hence his claim to use these days for religious purposes cannot be dismissed as a claim for a subsidy.

2. Philbrook's Second Proposal

Second, Philbrook offered to make up the time "if possible" [J.A. 25], an offer the Court below understood, 757 F.2d at 486, to include payment of a substitute's wages. In evaluating the Board's claim of undue hardship in response to this claim, it must be emphasized that the Board's objection is not to Philbrook's absence, since it allows Philbrook to absent himself on all his religious holidays. It objects only to paying him for his religious holidays. Thus, any claim of harm to the educational process would appear to be irrelevant to the Board's defense in this case. In any event,

the School Board made no effort at trial to prove that it was not possible for Philbrook to make up the classes he missed.

It is surely conceivable that Philbrook could reschedule the classes he missed during lunch hours, study periods, before or after school or at some other time. Perhaps there is some reason why this alternative would not work or why it is educationally unsound. The judgment of the court below does not preclude the Board from making such a showing. It merely holds that the Board must in fact do so before it could reject Philbrook's proposal.

The Board did adduce testimony tending to prove that substitute teachers, particularly those who are not certified in a particular area (in Philbrook's case, business skills) typically are unable to carry on meaningful instruction. [J.A. 55-9] The School Superintendent also testified that there were "very few business

certified substitutes available." [J.A. 56] The Superintendent also testified that equipment was typically damaged when substitutes were in a classroom. [A-73-74]

In this Court, the Board argues that "a loss of school system efficiency" [Brief at 26] constitutes more than a de minimis cost sufficient to establish undue hardship. Of course, any substantial interference with the educational mission of Ansonia's schools would constitute undue hardship although, as noted, the Board is willing to accept that interference when it is caused by non-religious absences, and is willing to tolerate it for religious observances so long as Philbrook does not seek to be paid for his absences.

There remain, moreover, additional unresolved factual issues on the undue hardship issue. Philbrook contends that for each holiday on which he was to be absent, he prepared assignments which allowed him

(and would have allowed school officials) to determine whether instruction had in fact taken place. [J.A. 68-70]

As to possible damage to equipment, the School Superintendent could only guess that damage took place when Philbrook was absent -- he admitted that he did not know whether it in fact took place. [J.A. 59] Moreover, Philbrook's absences were fundamentally different than the run-of-the-mill teacher absence, known to school officials at most a day or two beforehand. [J.A. 55-56] Philbrook's absences were known well in advance, and hence allowed petitioners greater time to locate qualified substitutes.

Finally, and perhaps most tellingly, petitioners' claims of hardship deserve the most critical scrutiny because they are not objecting to Philbrook's absence as such; on the contrary they concede Title VII requires that Philbrook be allowed to absent himself

[Brief at 17]; rather the Board objects only to ameliorating the financial impact of Philbrook's absences.

This Court's opinion in T.W.A. v. Hardison, supra, found that the employer had demonstrated undue hardship only upon a record which fully explored all of the proposed accommodations and their costs to T.W.A. While much, but not all, of the necessary evidence was in fact introduced in this case, the District Court failed to resolve crucial factual disputes concerning various conflicts in the evidence. Hence, the court below correctly ordered further fact finding on the undue hardship issue.

B. Neither of Philbrook's Proposals Constitutes An Impermissible Preference For Religious Employees

Petitioners contend [Brief at 28] that Philbrook seeks a discriminatory preference on the basis of religion in violation of Title VII:

> [R]equiring the school board to implement either of Philbrook's accommodation proposals, additional leave with full pay or additional paid leave less the cost of a substitute, would .... result in preferential treatment contrary to the intent and purpose of Title VII.

At the outset, it should be noted that the School Board has simply misstated Philbrook's proposals. Contrary to the Board's repeated assertions [Brief at 11, 17, 21], Philbrook does not seek unlimited additional paid leave, only the invalidation of a restriction barring the use of existing paid leave provisions for religious observances.

This first proposal is hardly a preference for religion. On the contrary, it is the present rule which constitutes a preference for non-religious personal business activities. It is one thing to hold that government may not "command[ ] that Sabbath religious concerns automatically control over all secular

interests at the workplace," Estate of Thornton v. Caldor, Inc., supra, 105 S.Ct. at 2918; it is quite another to say, as the Board does here, that government agencies may relegate religion to second-class status vis-a-vis secular concerns.

Philbrook's second proposed accommodation was that he be paid his ordinary salary, that he make up lost instructional time and that he pay for the additional (but lower) costs of a substitute. Under this proposal, as well, Philbrook would give full economic value for the accommodations he suggests. Adopting his solution confers no preference in any meaningful sense.

Furthermore, with respect to both of Philbrook's proposals, no other employee is disadvantaged or forced to involuntarily undertake additional, or undesirable, employment -- key indicia of an impermissible preference.

Of course, Title VII's accommodation provisions require that employees with religious practices be treated differently from other employees. Allowing a swap of shifts, or, as here, allowing extra days off with or without pay, or allowing federal employees to earn compensatory time to cover religious absences, see, 5 U.S.C. §5550a, or the dozens of other accommodations which have been required or approved in other circumstances, are all forms of special treatment. Such preferences, if so they be, are an inescapable element of any accommodation of a religious practice which requires actions which diverge from the cultural norm. Unless Congress acted unconstitutionally in amending Title VII to require reasonable accommodation of religious practices, this much preference must be allowed.

III. The Judgment Below Is Entirely Consistent With The Establishment Clause

A. Reasonable Accommodation is Constitutional

The Board contends that [Brief at 30-31]

> implementation of either of Philbrook's proposals ... would require the school board to alter existing work rules regarding paid leave solely because of Philbrook's religious beliefs. Such action would advance religion in violation of the first amendment.

The argument is advanced by the Board without supporting authority.

The constitutionality of "reasonable accommodation" has been summarily upheld by this Court, Rankins v. Comm'n on Professional Competence, 24 Cal.3d 167,593 P.2d 852, 154 Cal.Rptr. 907, app. dismissed, 444 U.S. 986 (1979), and, in the context of Title VII specifically, by each of the Courts of Appeal which have considered the

question.[14] These results are buttressed by the strong presumption of constitutionality attaching to an act of Congress, Rostker v. Goldberg, 453 U.S. 57 (1981).

But the same result follows application of the well settled three part test which this Court applies in Establishment Clause cases -- that a statute have a secular purpose, that it have a primary secular effect, and that it not unduly entangle government with religion, see, e.g.,

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[14] McDaniel v. Essex Int'l Inc., 696 F.2d 34 (6th Cir. 1982); Tooley v. Martin-Marietta Corp., 648 F.2d 1239 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); Nottelson v. Smith Steel Workers, D.A.L.U., 643 F.2d 445 (7th Cir.), cert. denied, 454 U.S. 1046 (1981); Accord, Protos v. Volkswagen of America, 615 F. Supp. 1513 (W.D.Pa. 1985); See also, American Motors Corp. v. Dept. of Industry, Labor and Human Relations, 93 Wis.2d 14, 286 N.W.2d 847 (Ct. of Apps. 1979 (state statute).

Witters v. Washington, 106 S.Ct. 748 (1986); Lemon v. Kurtzman, 403 U.S. 602 (1971). As Justice O'Connor, wrote, concurring in Estate of Thorton v. Caldor, Inc., supra, 105 S.Ct. at 2919:

> [A] statute outlawing employment discrimination based on race, color, religion, sex, or national origin has the valid secular purpose of assuring employment oportunity to all groups in our pluralistic society. See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 90 n.4 (1977). (Marshall, J., dissenting). Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice.

B. The Accommodations Proposed By Philbrook Do Not Establish Religion

Recognizing the general rule that religious accommodation does not violate the Establishment Clause, the Board rests its argument on mischaracterizing Philbrook's

proposals[15] as demanding "special employment preferences" (Brief at 30). His proposals are said to "aid one religion, aid all religions, or prefer one religion over another, Everson v. Bd. of Educ. 330 U.S. 1, 15 (1947)." Although the argument is cryptic, it appears that the Board is suggesting that granting additional paid leave would amount to a compelled subsidy for religious practice, and would therefore have the unconstitutional direct effect of advancing religion, cf. Hunt v. McNair, 413

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15 The Union's challenge rests solely on the Second Circuit's reading of the statute, which requires automatic deference to an employee's proposed accommodation -- a reading both incorrect and unnecessary to support the judgment, see p. 29, n.9, supra. Since this Court reviews only judgments, not opinions, it need not reach the Union's constitutional contentions.

U.S. 734, 742-43 (1973).[16]

Philbrook does not seek paid leave for all of his religious holidays, see supra, p. 42. Rather he seeks either to use paid leave which, he alleges, is in fact generally available for personal purposes, or to be allowed to make up lost days by rescheduling his classes.

Philbrook thus does not seek a gratuity or a subsidy, but the right to enjoy the earned "compensation, terms, conditions or

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[16] The Board does not challenge, as an unconstitutional subsidy, the three religious leave days. The state courts are divided over the constitutionality of similar contractual arrangements. Compare Hunterdon Central H.S. Bd. of Educ. v. Hunterdon Central H.S. Teachers' Ass'n, 174 N.J.Super 468, 416 A.2d 980 (App. Div. 1980) (unconstitutional) with Cal. School Emp. Ass'n v. Sequoia Union H.S., 67 Cal. App. 3d 157, 136 Cal. Rptr. 594 (1977); Americans United v. County of Kent, ___ Mich. App. ___, 293 N.W.2d 723 (1980) (constitutional). Cf. Mandel v. Hodges, 54 Cal. App.3d 596, 127 Cal. Rptr. 244 (1976) (Good Friday afternoon as paid vacation day); Frank v. City of Niles, C-81-0777-Y (N.D. Ohio 1982) (same). Amici express no view on this issue.

privileges" of his employment. That is no more an impermissible subsidy than exists when the "State ... issue[s] a paycheck to one of its employees, who may ... donate all ... of that paycheck to a religious institution," Witters v. Washington Dep't of Services For The Blind, 106 S.Ct. 748, 751 (1986); cf. Bradfield v. Roberts, 175 U.S. 291 (1899).

The same result obtains under the three part test. If granted, neither of Philbrook's proposals would suggest that "government's actual purpose is to endorse or disapprove of religion," Wallace v. Jaffree, 105 S.Ct. 2479, 2490 (1985). Surely, treating all forms of religious observance in the same way as absences to transact personal business are treated suggests no endorsement of religion, Witters v. Washington Dep't of Services For The Blind, supra; on the contrary, singling out religion for adverse treatment might

legitimately be seen as "disapproval" of religion by the School Board.

The primary effect of adopting Philbrook's proposals, under the limitations imposed by the judgment below, would not be to subsidize or advance religion. The only sense in which religion is aided in the Establishment Clause sense if either of Philbrook's proposed accommodations is adopted is the elimination of what amounts to a penalty for observing religious practices more demanding than the norm. That is no more an establishment than the accommodations upheld against Establishment Clause challenge in a variety of contexts, see, e.g., Thomas v. Rev. Bd., 450 U.S. 707 (1981); Arlan's Dep't Store v. Ky., 371 U.S. 218 (1962).

The reasons for this are not hard to find. The duty to accommodate is a response to an independent choice of the individual involved, cf. Wallace v. Jaffree, supra, 105

S.Ct. at 2491, n.45, and hence lacks one of the hallmarks of an establishment -- gratuitous efforts by government to advance religious ends, Mueller v. Allen, 103 S.Ct. 3062, 3069 (1983).

Moreover, since neither of Philbrook's proposals imposes any burden on any other employee, Estate of Thornton v. Caldor, supra, does not support petitioners' arguments for a reversal. There the statute required, an "unyielding weighting in favor of Sabbath observers over all other interests," and hence had "a primary effect [of advancing] a particular religious practice." No such unyielding burden is imposed here, either on Philbrook's fellow employees or his employer. Title VII, after all, contains an undue hardship exception (whose applicability here remains open on remand) and is available to protect all forms of religious practices, not just Sabbath observance.

Because there is in this case no credible establishment of religion, it is not necessary to consider what impact the Free Exercise Clause has on the claims asserted by the Board, which is, after all, a public employer, cf. Estate of Thorton v. Caldor, supra, 105 S.Ct. at 2919 (O'Connor, J., concurring).

This Court's decisions establish both that public employees enjoy substantial constitutional protections vis-a-vis the government even in its capacity as an employer, Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Connick v. Myers, 461 U.S. 138 (1983); Wygant v. Bd. of Educ., supra, 54 U.S.L.W. at 4881, n.4, and that the Free Exercise Clause requires a significant degree of accommodation of religious practice by government, see, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972). Those principles, would, of course, further dilute the Board's Establishment Clause claim;

indeed, they might well overshadow it, cf. Widmar v. Vincent, 454 U.S. 263 (1981).

CONCLUSION

For the reasons stated, the judgment below, remanding this case for further fact-finding, should be affirmed.

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June, 1986